

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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:   
SOURCEAMERICA, et al., : Civil Action No.   
:   
Plaintiffs, : 1:17-CV-893   
:   
versus :   
:   
UNITED STATES DEPARTMENT OF EDUCATION, :   
et al, :   
Defendants. : October 12, 2018  
-----x

The above-entitled Motions hearing was continued  
before the Honorable T.S. Ellis, III, United States District  
Judge.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

SONIA NASSEHZADEH TABRIZ, ESQ.  
Craig A. HOLMAN, ESQ.  
Arnold & Porter Kaye Scholer LLP  
601 Massachusetts Ave NW  
Washington, DC 20001-3743

FOR THE DEFENDANTS:

LAUREN A. WETZLER, ESQ.  
United States Attorney Office  
2100 Jamieson Ave  
Alexandria, VA 22314

JAMES C. LUH, ESQ.  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
2100 Jamieson Ave  
Alexandria, VA 22314

FOR THE INTERVENOR:

JONATHAN RICHARD MOOK, ESQ.  
DiMuro Ginsberg  
1101 King Street  
Suite 610

Alexandria, VA 22314-2956  
Appearances cont'd:

FOR THE INTERVENOR:

PETER A. NOLAN, ESQ.  
Winstead PC  
401 Congress Avenue  
Suite 2100  
Austin, TX 78701

OFFICIAL UNITED STATES COURT REPORTER:

MS. TONIA M. HARRIS, RPR  
United States District Court  
Eastern District of Virginia  
401 Courthouse Square  
Ninth Floor  
Alexandria, VA 22314  
703-646-1438

P R O C E E D I N G S

(Court proceedings commenced at 12:52 p.m.)

THE DEPUTY CLERK: SourceAmerica, et al versus  
United States Department of Education, et al. Civil Case No.  
1:17-CV-893.

(Discussion off the record.)

THE COURT: Now, who's here for the plaintiff?

MS. TABRIZ: Good morning, Your Honor. Sonia Tabriz  
here on behalf of plaintiff SourceAmerica and Lakeview Center,  
Inc. with my colleague Craig Holman, who will be arguing.

THE COURT: All right.

MS. TABRIZ: Or afternoon.

THE COURT: Who's here for the defendant?

MS. WETZLER: Good afternoon, Your Honor. Lauren  
Wetzler from the United States Attorney's Office. With me is  
James Luh from the Department of Justice on behalf of the  
federal defendants.

THE COURT: All right. And for the intervenor.

MR. MOOK: Yes. Jonathan Mook, Your Honor, on  
behalf of the State of Kansas. And with me today is Peter  
Nolan, a member of the bar of the State of Texas whom you  
admitted pro hac vice for purposes of this case and he will be  
arguing the matters.

THE COURT: All right. Thank you. I'm familiar  
with the case and with the parties. What I'm going to do is

1 give you a reasonable time to say anything you want to say  
2 about your position on this attack on an arbitration  
3 conclusion. And then I think I'm pretty satisfied with what  
4 I've seen in the briefs, but see if you can distill what you  
5 have to say in ten minutes and be sure you add anything you  
6 haven't said that you think is important and emphasize what  
7 you have said that you think is dispositive or important.

8 All right. Let's see, yes. You're SourceAmerica.

9 MR. HOLMAN: And Lakeview Center, Your Honor.

10 THE COURT: You're attacking this arbitration  
11 result?

12 MR. HOLMAN: Yes, Your Honor.

13 THE COURT: And let me hear first from you and then  
14 I'll go to the U.S. and then I'll go to the intervenor.

15 MR. HOLMAN: We appreciate your time, Your Honor. I  
16 recognize this is the third time that we've been in front of  
17 you in this case. I do know you're familiar with it so I'm  
18 not going to belabor the points and I'm happy to take you up  
19 on doing this in ten minutes or less.

20 What I really want to focus on here today, probably  
21 the biggest development that we've had since the last time we  
22 were in front of this Court, is the summary judgment -- the  
23 cross motions for summary judgment filing. And we actually  
24 now, having gotten past the motion to dismiss, have seen the  
25 positions of the United States, particularly the defendants in

1 this matter, the Department of Education and the army.

2 And what has become crystal clear, as we've pointed  
3 out from earlier pleadings, and as this Court would know from  
4 the earlier record, the United States actually agrees with us.  
5 The RSA does not cover the dining facility attendant services  
6 at Fort Riley. That is now established in this record. The  
7 Department of Education, the Department of the Army, and the  
8 plaintiffs are in agreement the DFA does not cover the Fort  
9 Riley services.

10 These are -- as the Court knows, the  
11 Randolph-Sheppard Act has language in it that relates to  
12 operation of vending facilities that has spun out a stream of  
13 litigation that Your Honor has now got a case in front of him.  
14 We believe the recent decisions in this area have all  
15 concluded as has the United States here that DFA services,  
16 dining facility attendant services, busboy services,  
17 janitorial services do not constitute the operation of dining  
18 facility attendants or excuse me, an operation of vending  
19 facilities, which involves the delivery of the food.

20 At Fort Riley, military soldiers have come back from  
21 the Iraq and Afghanistan wars and are actually delivering  
22 those services. All this contract relates to that the U.S.  
23 AbilityOne Commission has put on the Procurement List and  
24 designated for Lakeview Center are dining facility attendant  
25 services.

1           Probably the most significant thing, Your Honor,  
2           that has changed since your earlier ruling in this matter, as  
3           I've mentioned, is that you now have the position in this  
4           litigation of the Department of Education and the Department  
5           of the Army and it's an agreement on the substantive issue in  
6           this case.

7           The arbitration decision is wrong. It violates the  
8           RSA. It violates the policy statements that the Department of  
9           Education has put out with the army and the U.S. AbilityOne  
10          Commission. It violates the statements that Congress has put  
11          out in connection with the 2015 NDA about the meaning of these  
12          statutes. It violates the plain meaning of the statute as far  
13          as I'm concerned.

14          We also have a second count, Your Honor, that  
15          addresses the Javits-Wagner-O'Day Act. Before this action  
16          even started -- and I want, if I could, before I move away  
17          from the RSA -- I do want to mention *NISH v. Cohen*, because  
18          it's been briefed back and forth. It's a Fourth Circuit case  
19          that actually deals with the RSA. What's most interesting to  
20          me about *NISH v. Cohen* is it went in front of the Fourth  
21          Circuit. And the Fourth Circuit's ruling in that case was  
22          that the Court needed to defer to the position of the army  
23          that contracted, procuring agency, as to whether the work  
24          involved was covered by the RSA.

25          In this case, the army has consistently from day

1 one, the procuring agency, said this work was covered by the  
2 Javits-Wagner-O'Day Act not the RSA. The U.S. AbilityOne  
3 Commission, a federal agency, has since day one said this work  
4 was conducted by -- it is covered by the Javits-Wagner-O'Day  
5 Act, not the RSA. And now we have the position of the  
6 Department of Education announced in this litigation they too  
7 agree.

8           The only party that has any relevance to this that  
9 suggest that this is actually RSA work, is Kansas. Every  
10 federal government entity, and the plaintiffs all agree this  
11 is not RSA work, indeed. And the Javits-Wagner-O'Day Act,  
12 Your Honor, as I've pointed out, by notice and comment  
13 rulemaking, not objected to by Kansas, this work was added  
14 several years ago now to the Javits-Wagner-O'Day Act. It is  
15 JWOD Procurement List work. It has been now for several  
16 years.

17           I want to touch briefly, Your Honor, on two other  
18 issues and then I'm going to take you up on your offer to keep  
19 it brief. Our participation, Lakeview Center and  
20 SourceAmerica, as you know, you've heard this before, when the  
21 arbitration panel was convened, twice in writing,  
22 SourceAmerica and Lakeview Center attempted to intervene in  
23 the arbitration proceeding and once in person at the  
24 arbitration proceeding. We have a count in front of Your  
25 Honor that makes clear under the Administrative Procedure Act,

1 which this proceeding was conducted under, that we had a right  
2 under 555(b) to participate in that action, a statutory right  
3 to participate in that action. The arbitrators never  
4 expressed a reason for not allowing our participation, indeed  
5 they ignored it. That alone, if you don't agree with us, on  
6 the RSA and the JWOD to the point that you want to actually  
7 issue this Court's opinion on that is reason for this  
8 arbitration decision to be thrown out in this matter to be  
9 remanded.

10 Separately, Your Honor, as we pointed out, the  
11 arbitration panel, General Carey, there were three  
12 arbitrators. General Carey, the third arbitrator, wrote a  
13 dissenting opinion in this matter where he questioned the  
14 fundamental fairness of the arbitration panel. He did so at  
15 the behest of the United States Army which asked to vacate  
16 that opinion, both because SourceAmerica and Lakeview were  
17 prohibited from testifying despite that they were on the  
18 army's witnesses and also attempted to do so on their own  
19 behalf; and, because there were improprieties among improper  
20 communications, ex parte communications, between Kansas  
21 counsel and the -- and the arbitration chair; and, because  
22 there were undisclosed relationships between the other two  
23 panel members, all of these things led General David Carey  
24 retire to question the fundamental fairness of this panel and  
25 to recommend that the panel decision be vacated. It was



1 himself to recommend that and declared it fundamentally  
2 unfair. Itself, an extraordinary conclusion.

3 We've pointed out under 557(b) that we have an  
4 affidavit in the record, not from us, from the army  
5 contracting officer who overheard the ex parte communication  
6 that there was indeed an improper ex parte communication that  
7 caused the chair of the arbitration panel to reverse her  
8 ruling to allow us -- to allow SourceAmerica and Lakeview to  
9 testify in this matter. There was an ex parte communication  
10 that took place accounted to by the army contracting officer  
11 immediately prior to the arbitration chair changing position  
12 on that topic.

13 Again, 557(b), Your Honor, APA is clear on the  
14 necessary outcome. For that reason we request this Court --  
15 to these reasons we request this Court to grant our motion for  
16 judgment on the administrative record and into the relief  
17 we've requested.

18 THE COURT: What was the relief again, remind me?

19 MR. HOLMAN: Well, we've actually asked Your Honor  
20 to enter a ruling that this work is covered by the  
21 Javits-Wagner-O'Day Act, not the Randolph-Sheppard Act, and to  
22 vacate the lower decision, and also to enter an injunction  
23 preventing the U.S. Army or the Department of Education from  
24 filing that decision. I don't know whether they would or they  
25 wouldn't to be candid with you, Your Honor. But the problem

1 right now with an arbitration decision in place --

2 THE COURT: Well, I certainly wouldn't enjoin  
3 somebody from doing something they say they're not going to  
4 do. All right.

5 MR. HOLMAN: Well, I mean if they represent that,  
6 Your Honor, I will certainly accept it.

7 THE COURT: Let me go on now. Who is here on behalf  
8 of the United States, that is the army and --

9 And who else are you here for?

10 MR. LUH: Your Honor, all the federal defendants.  
11 That being, the Department of Education, the Department of the  
12 Army, the Secretary of the Army, and the Department of Defense  
13 and the Secretary of Defense.

14 THE COURT: All right. Proceed.

15 MR. LUH: Your Honor, we'll be brief. I think you  
16 noted our positions are laid out in our briefs.

17 First of all, I should note that we did ask the  
18 Court to revisit some of the threshold defenses we raised at  
19 the motion to dismiss stage that were rejected by the Court.  
20 We're happy to answer questions about those, but otherwise our  
21 position on those are pretty clear in the briefs and we -- we  
22 don't feel any need at this point to rehash them further in  
23 this proceeding.

24 Going to the merits, Your Honor. We agree with  
25 the -- at least the ultimate conclusion presented by

1 SourceAmerica and Lakeview that the arbitration panel  
2 misapplied the Randolph-Sheppard Act. We believe that the  
3 army --

4 THE COURT: Well, they didn't misapply it. Your  
5 argument is that it wasn't applicable.

6 MR. LUH: Exactly, Your Honor.

7 THE COURT: That's different from misapplying it.

8 MR. LUH: Certainly, Your Honor. To the extent that  
9 there's a distinction between misapplying and misinterpreting,  
10 the scope of the statute we are arguing that the arbitration  
11 panel misinterpreted the Randolph-Sheppard Act when it  
12 concluded that the Randolph-Sheppard Act covered the dining  
13 facility attendant services at Fort Riley.

14 THE COURT: All right. Go on.

15 MR. LUH: The arbitration panel essentially ruled  
16 that or they interpreted the Randolph-Sheppard Act as applying  
17 to serve any contract or services pertaining to or integral to  
18 operation of the cafeteria. But the terms of the  
19 Randolph-Sheppard Act extend the Randolph-Sheppard Act  
20 priority to contracts for operation of vending facilities or  
21 operations of cafeterias by the contractor. And we believe  
22 that's -- that statutory phrasing does not encompass a  
23 contract for ancillary services delivered in support of the  
24 cafeteria operation, at least where the contractor is not  
25 involved in any -- is not directly involved in any service of

1 or preparation of food.

2           Your Honor, the arbitration panel also found  
3 that the army had violated the provision in Section 107(b) of  
4 the Randolph-Sheppard Act requiring advanced view by the  
5 Secretary of Education of any limitation on the placement or  
6 operation of vending facilities. We believe that provision  
7 did not apply because that provision is aimed at restricting  
8 agencies from imposing unjustified restrictions on the  
9 operation of vending facilities and not on ensuring the  
10 continuation of contract relationships with Randolph-Sheppard  
11 Act vendors. So we believe that that provision was  
12 inapplicable to the army's actions in dispute in the  
13 arbitration.

14           Finally, Your Honor, we believe that the arbitration  
15 panel erred when it found that the army's actions violated the  
16 John Warner National Defense Authorization Act provision, the  
17 so-called no-poaching provision. Because if -- the terms of  
18 that no-poaching provision clearly indicate that it does not  
19 actually expand the terms of the Randolph-Sheppard Act or  
20 extend it to situations that don't fall -- that didn't fall  
21 within the terms of the Randolph-Sheppard Act before the  
22 provision was enacted. So there's no basis for reading the  
23 no-poaching provision to apply the Randolph-Sheppard Act if  
24 there was no -- if -- activities that weren't within the  
25 coverage of the Randolph-Sheppard Act before the provision was

1 enacted.

2 We do, Your Honor -- we -- so, Your Honor, we agree  
3 with the ultimate conclusion that the panel erred, but we --  
4 we certainly disagree with SourceAmerica and Lakeview on a  
5 number of key issues. The most important of which is the  
6 relief that should be granted here. As we've argued in our  
7 briefs, the appropriate remedy here is remand for a corrected  
8 decision and injunctive relief should not issue at all.

9 THE COURT: Remand for whom to make a decision?

10 MR. LUH: Remand of the decision to the Secretary of  
11 Education who would then initiate any necessary proceedings at  
12 the agency level. There would be a remand to the Department  
13 of Education because the Secretary of Education is responsible  
14 for convening arbitration panels and has an overall management  
15 responsibility of the arbitration process in that respect. So  
16 the remand would be to the Department of Education.

17 Your Honor, the plaintiffs, having so much disputed  
18 that remanded the appropriate remedy, and in fact I believe  
19 they even mentioned remand as the outcome here, but they're  
20 also seeking injunctive relief or they're seeking language in  
21 the Court's remand order that would direct the agencies or  
22 the -- the Department of the army or the Department of  
23 Education and any further proceedings. We believe that's  
24 improper, Your Honor.

25 The ordinary remedy again is remand -- is a remand

1 that permits the agency to decide it exactly how to implement  
2 the Court's legal ruling and there's not a basis here.  
3 There's no extraordinary circumstances that would justify a  
4 continued supervision in the form of an injunction.

5 Your Honor, we also disagree that the Court should  
6 reach any issues concerning the Javits-Wagner-O'Day Act. As  
7 the Court explained in its March 2018 opinion on pages 16 and  
8 17, the authority of the Randolph-Sheppard Act arbitration  
9 panel is quite narrow and is limited to deciding  
10 Randolph-Sheppard Act issues and the Randolph-Sheppard Act  
11 arbitration panel doesn't have general jurisdiction to decide  
12 issues under other statutes. And accordingly, this Court on  
13 review should not visit the effects of other statutes.

14 As -- as for the arguments that the arbitration  
15 panel erred in failing to act on the request by Lakeview and  
16 SourceAmerica to participate in the proceeding, that error was  
17 harmless because it's clear that SourceAmerica and Lakeview  
18 would only have reiterated the legal arguments that were  
19 already made by the army and that -- and those legal arguments  
20 pertain to the Javits-Wagner-O'Day Act, which the arbitration  
21 panel did not rule on and under Fourth Circuit law did not  
22 have authority to rule on.

23 The plaintiff's also have raised this new claim  
24 regarding bias in the proceedings or improper ex parte  
25 communications. We don't believe that those claims were

1 properly raised in the plaintiff's complaint, nor were they  
2 discussed at length -- I'm sorry -- we don't believe they were  
3 properly raised in the plaintiff's complaint. They were  
4 introduced for the first time in the plaintiff's summary  
5 judgment brief. And in any event we believe the claims are  
6 legally insufficient because Section 557, the APA provision  
7 controlling formal adjudication, is not applicable in this  
8 case because the statute does not specify proceedings on the  
9 record after opportunity for an agency hearing, which is the  
10 necessary language that must appear in the statute before  
11 Section 557 becomes applicable.

12 THE COURT: I'm sorry would you say that last again?  
13 Why is it that those ex parte communications are not covered  
14 by the APA?

15 MR. LUH: Your Honor, the -- the plaintiffs are  
16 relying on the ban on ex parte communications under 5 U.S.C.  
17 557, which specifies requirements -- certain additional  
18 procedural requirements that must be followed in formal  
19 adjudication as opposed to informal adjudication. And the  
20 Supreme Court has explained, in the case I think we cited is  
21 *United States v. Florida East Coast Railway Company*. The  
22 Supreme Court has explained that these additional  
23 requirements, these special formal adjudication requirements  
24 are applicable only when the statute specifies that the --  
25 that the agency is to conduct proceedings on the record after

1 opportunity for an agency hearing or use his words that are  
2 equivalent to that language. And the Court in *Florida East*  
3 *Coast Railway* found that the statutory phrase, after a  
4 hearing, did not do it, did not trigger those 557  
5 requirements.

6 And we believe here the Randolph-Sheppard Act does  
7 not trigger the 557 requirements and the plaintiffs haven't  
8 pointed to any case law that would suggest that they -- that  
9 it does trigger those requirements.

10 Even if those -- finally, if those requirements are  
11 applicable, the ex parte communications would provide a basis  
12 for vacating a decision only if they irrevocably taint the  
13 decision. And, Your Honor, as described in the plaintiff's  
14 briefs and in the affidavit that they rely on from the army  
15 contracting officer, these -- the limited ex parte  
16 communications that occurred, according to the affidavit,  
17 certainly do not rise to the level of tainting the proceeding  
18 that they simply rehash concerns that had already been made on  
19 the record by the -- the attorneys for the parties and the  
20 proceeding.

21 Your Honor -- finally, Your Honor, with respect to  
22 the procedural due process claim, as we explained in our  
23 initial brief, the Court should not reach that claim because  
24 -- unless it first rejects all of the plaintiffs' statutory  
25 arguments, because a Court generally should not reach



1 constitutional issues unless it's absolutely necessary. And  
2 the plaintiffs haven't disputed that principle.

3           However, if the Court does reach the due process  
4 claim, we believe the claim should be rejected because the  
5 plaintiffs here have not asserted a -- a constitutionally  
6 protected property interest in either receipt -- in the  
7 receipt of a government contract. And they also haven't  
8 alleged they've been deprived of any constitutionally  
9 protected property interest either in their status of -- as --  
10 in their status as authorized providers of the services under  
11 the Javits-Wagner-O'Day Act. The plaintiffs still has that  
12 status and they still conceivably could get a contract.

13           THE COURT: Thank you. All right. The intervenor.

14           MR. NOLAN: Thank you, Your Honor.

15           I bring a somewhat unique perspective to this case

16 --

17           (A pause in the proceedings.)

18           (Discussion off the record.)

19           THE COURT: Go ahead, sir.

20           MR. NOLAN: I was saying I bring a unique  
21 perspective to this case. I'm the only one who's performed KP  
22 in the mess halls at Fort Riley. It was almost 50 years ago,  
23 but I have a little perspective on this.

24           And I think we start -- I'm going to talk about the  
25 application of the Randolph-Sheppard Act --

1 THE COURT: Well, it couldn't have been 50 years  
2 ago. You're not 70 years old. You couldn't have been 20  
3 years old when you did it.

4 MR. NOLAN: I'm 68.

5 THE COURT: I see. Well you're hiding that.

6 MR. NOLAN: I'm sorry, Your Honor.

7 THE COURT: Your chemical enhancements need to be  
8 revealed.

9 MR. NOLAN: I passed the drug test on the way in.

10 THE COURT: All right. Go ahead, sir.

11 MR. NOLAN: I think we need to start with the  
12 purpose of the Randolph-Sheppard Act. And it is to expand  
13 opportunities for the blind. Everybody agrees with that.

14 The 1974 Senate report, which counsel for the  
15 defendants brought to the Court's attention, explain that back  
16 in 1974 there were amendments, which were passed because of  
17 the singular insensitivity of the Department of Defense to the  
18 concept that it was supposed to work with the Department of  
19 Education and the state licensing agencies to actually create  
20 opportunities for the blind, not to eliminate opportunities  
21 for the blind.

22 The 1974 amendments to the Randolph-Sheppard Act  
23 expanded these opportunities, specifically to cafeteria  
24 services. And the definition of vending facility and the  
25 Randolph-Sheppard Act includes the sale of services

1 specifically. This aligns with what the Department of Defense  
2 maintains. They maintain that all civilian operators of  
3 cafeteria contracts provide only some of the services that  
4 support the operations of military dining facilities.

5 The Department of Defense points out that they  
6 always maintain responsibility for certain services and all  
7 cafeteria contracts, whether they are the full food service  
8 contracts or the DFA contracts we're talking about today. And  
9 I think another point -- important point is is that this Fort  
10 Riley DFA cafeteria contract was for all of the cafeteria  
11 services supporting the operation of the Fort Riley mess  
12 halls, which were not provided by the army. It was the entire  
13 cafeteria contract that was led to civilian companies.

14 These services -- the evidence at the hearing were  
15 these services were not ancillary to the operation of the  
16 dining facilities contract, they were integral to the  
17 operation of the dining facilities contract. That was the  
18 evidence at the arbitration.

19 The evidence at the arbitration were that these  
20 services are classified by the Department of Defense as dining  
21 facility services. And the evidence at the arbitration was  
22 that dining facility and cafeteria mean the same thing. So  
23 the army -- the Department of Defense classified these --

24 THE COURT: Just a moment. Mr. Flood, can you tell  
25 the folks outside that it's been delayed. I think they're

1 here --

2 (Discussion off the record.)

3 THE COURT: Go ahead, sir.

4 MR. NOLAN: So it's the Department of Defense that  
5 maintains that this is a cafeteria contract providing  
6 cafeteria services integral to the cafeteria operation. And  
7 in fact, the employees providing the services are classified  
8 as food employees by the Department of Defense. The evidence  
9 at the hearing is also that the Department of Defense admitted  
10 it may have allowed state licensing agencies to contract for  
11 DFA contracts in the past and there was no allegation that  
12 these DFA contracts run by blind managers were somehow  
13 violated the law.

14 And Kansas actually was operating a hybrid DFA  
15 contact at Fort Riley for years prior to this solicitation  
16 we're talking about. It was DFA plus, I think, some potato  
17 peeling and maybe a contingency cook. And DOD maintains that  
18 such contracts are subject to the Randolph-Sheppard Act.

19 Now, the Department of Defense wants to eliminate  
20 the provision of the Randolph-Sheppard Act to DFA contracts,  
21 which they had historically allowed and to these hybrid DFA  
22 contracts, which Kansas historically allowed. The majority of  
23 the arbitration panels, which have addressed this issue, have  
24 found that the Randolph-Sheppard Act applies to DFA cafeteria  
25 services. Many courts have agreed with that assessment. Some

1 courts have not, but many of them have not directly addressed  
2 the issue. But what all these tribunals have in common, or  
3 almost all of them, is they have all requested or suggested  
4 that the Department of Education, not attorneys for the army,  
5 but that the Department of Education opine on the application  
6 of the Randolph-Sheppard Act to DFA cafeteria services. And  
7 the Department of Education has, and its opinion is clear and  
8 authoritative that the Randolph-Sheppard Act --

9 THE COURT: I'm sorry.

10 (Discussion off the record.)

11 THE COURT: Go ahead, sir. You may complete your  
12 argument.

13 MR. NOLAN: The Department of Education has spoken.  
14 We don't have to -- we don't have to go through a mouthpiece.  
15 The Department of Education has spoken. You have that letter  
16 from Secretary DeVos saying that the Randolph-Sheppard Act  
17 applies to these DFA contracts and she cites as an example of  
18 an arbitration panel which got it right the very arbitration  
19 panel who you are reviewing today.

20 THE COURT: But is that contrary to what counsel has  
21 said today? Well, let me ask right now so that I'm clear  
22 about it.

23 Do you know what letter he's referring to, sir?

24 MR. LUH: Your Honor, I believe he's referring to  
25 the letter that was reproduced at ECF 43-1. It's a letter

1 from Secretary DeVos to --

2 THE COURT: All right. Is your position today on  
3 behalf of the army and the Department of Education, especially  
4 the Department of Education, that the Randolph-Sheppard Act  
5 applies or doesn't apply?

6 MR. LUH: To the army services at Fort Riley, sir?

7 THE COURT: Yes.

8 MR. LUH: Your Honor, the position is of the United  
9 States is that the Randolph-Sheppard Act does not apply to the  
10 services -- the Fort Riley services at issue.

11 THE COURT: Well, does the letter say otherwise?

12 MR. LUH: The letter does not say otherwise, Your  
13 Honor. The letter does cite the Kansas decision that's under  
14 review here. And it certainly does so in a way that seems to  
15 be -- to look favorably on the decision, but as we've  
16 explained in the briefs, Your Honor, this letter does not  
17 adopt the analysis of the -- of the Kansas arbitration panel  
18 in any formal matter that would establish a definitive  
19 interpretation by the Secretary of Education or the Department  
20 of Education pursuant to its congressionally and delegated  
21 authority.

22 THE COURT: Does the Secretary say that the RSA is  
23 applicable or inapplicable?

24 MR. LUH: I don't think -- she makes a statement  
25 about whether it's applicable to the Fort Riley services, Your

1 Honor, in the letter.

2 MR. NOLAN: Your Honor, may I read a -- may I borrow  
3 this letter and read the portion which I think answers your  
4 question directly?

5 THE COURT: All right.

6 MR. NOLAN: What she says specifically is that the  
7 education department believes that the Randolph-Sheppard Act  
8 priority applies to both types of cafeteria contracts. And  
9 she's referring to full food service and DFA. I don't know  
10 how much more direct she could be.

11 She says, "An arbitration panel recently convened to  
12 consider a dispute under the Randolph-Sheppard Act concerning  
13 a cafeteria at Fort Riley Kansas. The panel concluded that  
14 where the tasks to be performed by a contractor for DFA  
15 services, includes tasks that constitute an integral element  
16 of providing food services at a military cafeteria facility or  
17 pertain to the operation of a cafeteria, or tasks that without  
18 which the cafeterias would not be able to function..."

19 And those are all facts. These are all in quotation  
20 marks found at this very arbitration, such contracts.

21 "...fall within the definition, included in the  
22 Randolph-Sheppard Act and it's implementing regulations and  
23 are entitled to Randolph-Sheppard Act priority when awarding  
24 --

25 THE COURT: Now, are you taking a position on behalf

1 of the Department of Education that is contrary to that  
2 letter?

3 MR. LUH: Your Honor, not contrary to the letter,  
4 because the letter does not take a position that the -- that  
5 the Fort Riley services are covered by the Randolph-Sheppard  
6 Act, but, yes we are taking the position, as the United  
7 States, that the Fort Riley services at issue in this case are  
8 not subject to the Randolph-Sheppard Act. As --

9 THE COURT: I'm sorry, but I seem to be  
10 understanding you as saying that you don't agree with the  
11 Secretary of Education.

12 MR. LUH: Your Honor, I don't think that -- again, I  
13 don't think there's a disagreement here. I think that the --  
14 that the position that we've stated is consistent with the  
15 Department of Education's statements in the letter that  
16 perhaps there could be some dining facility attendant services  
17 that would be subject to the Randolph-Sheppard Act. I don't  
18 think that there's a clear and considered conclusion in the  
19 Secretary of Education's letter that in fact the services at  
20 issue in the Kansas case --

21 THE COURT: Does she refer in her letter to the  
22 arbitration?

23 MR. LUH: Yes, Your Honor, it does cite the  
24 Kansas --

25 THE COURT: She cites it approvingly?



1 MR. LUH: Your Honor --

2 THE COURT: You don't nod or shake your head. It  
3 has the effect of interrupting the speaker. It's rude.  
4 Remain dispassionate.

5 MR. NOLAN: I'm sorry. I will.

6 THE COURT: Go ahead, sir.

7 MR. LUH: Your Honor, it does cite approvingly the  
8 Kansas arbitration decision. But, again, it says not do so in  
9 a manner that makes clear that the Secretary is exercising her  
10 congressionally delegated authority to interpret the  
11 Randolph-Sheppard Act --

12 THE COURT: You need to go back -- because I'm going  
13 to have it typed up -- you need to go back and read this and  
14 ask yourself whether that makes any sense at all, because  
15 right now it doesn't make sense to me. But I'm going to read  
16 it again. I think she says X and you're saying not X.

17 Now, I'll look at it carefully, but maybe you should  
18 get something from the Secretary of the Education that says no  
19 I didn't mean what it think -- what you think it means, the  
20 plain language. It does sound like its approving the -- the  
21 judgment of the -- of the panel.

22 MR. LUH: Your Honor, respectfully, in addition to  
23 whether there's an approval of the conclusion of the or the  
24 interpretation of the Kansas panel, which I think is a  
25 disputable point, but in addition to that issue there's a

1 secondary issue of whether at that point in the  
2 interpretation, the Secretary is actually exercising her  
3 congressionally delegated authority to interpret the  
4 Randolph-Sheppard Act.

5 THE COURT: Oh, well, now you're making something  
6 clearer. Don't nod or shake your head.

7 MR. NOLAN: I --

8 MR. LUH: As we --

9 THE COURT: What I think you're now saying is that  
10 you don't agree with the Secretary. She acted ultra vires.

11 MR. LUH: Your Honor, no, we're not saying --

12 THE COURT: Let me ask you something. You don't  
13 have to answer this, but I'm curious. In preparing for this  
14 argument, did you consult with the Secretary of Education on  
15 the position to be taken?

16 MR. LUH: Your Honor, the -- the United States --

17 THE COURT: Is that a yes or a no?

18 MR. LUH: We are presenting that --

19 THE COURT: I'm sorry, is that --

20 MR. LUH: Not personally with the Secretary herself,  
21 Your Honor.

22 THE COURT: Did you consult with somebody in  
23 authority at the Department of Education?

24 MR. LUH: Yes, Your Honor.

25 THE COURT: And was this -- at what level, assistant

1 secretary, deputy?

2 MR. LUH: Your Honor, we -- I'd prefer not to  
3 discuss --

4 THE COURT: All right. Let me --

5 MR. LUH: -- attorney-client communications.

6 THE COURT: I've heard enough today. But let me  
7 tell you, quite frankly, I'm disturbed by this. I look at  
8 this letter in a commonsensical determination or understanding  
9 of what this letter says seems to be at odds with what you're  
10 conceding on behalf of the Secretary of Education. And it  
11 seems to me that that requires clarification. So I'm going to  
12 require that you submit to the Court by Wednesday of next week  
13 a pleading that says you are representing to the Court that  
14 you -- that the Secretary of Education agrees with the  
15 position you're now taking.

16 Is that clear?

17 MR. LUH: Your Honor, we understand the order. The  
18 Department of Justice represents the United States in  
19 litigation and the Department of Justice reaches those  
20 positions in consultation with the effected agencies.

21 THE COURT: So you didn't consult with anybody at  
22 the Department of Education? You consulted with somebody at  
23 DOJ.

24 You're a -- you're an assistant U.S. Attorney, is  
25 that correct?

1 MR. LUH: Your Honor, I have --

2 THE COURT: I'm sorry. Are you an assistant U.S.  
3 Attorney?

4 MR. LUH: No, Your Honor, I'm not. I --

5 THE COURT: What is your position?

6 MR. LUH: I'm a senior trial counsel in the civil  
7 division at the Department of Justice, at main justice.

8 THE COURT: Did you consult, in preparing for this  
9 argument, with an official at the Department of Education?  
10 You've said --

11 MR. LUH: Yes, Your Honor. And again, the  
12 department -- every agency has processes for consulting with  
13 the Department of Justice in litigation and we --

14 THE COURT: You've been here today -- enough.  
15 You've been here today, you've represented that the Department  
16 of Education now agrees with the plaintiff as to whether the  
17 RSA applies or not, is that correct?

18 MR. LUH: Your Honor, there are -- Your Honor, there  
19 may be differing positions within the -- the government among  
20 agencies in terms of legal issues. The --

21 THE COURT: Are you -- am I now hearing this "deep  
22 state" sort of argument?

23 MR. LUH: The Department of Justice presents the  
24 United States unified position in litigation.

25 THE COURT: I don't think -- I don't know who the

1 Secretary of Education is, but I doubt seriously that she  
2 would say -- I think it's a woman. I doubt seriously she  
3 would say the Department of Justice speaks for me.

4 MR. LUH: Your Honor --

5 THE COURT: That's what you're saying.

6 MR. LUH: Your Honor, the Department of Justice does  
7 speak for the Secretary in this litigation.

8 And again, Your Honor --

9 THE COURT: No, they have a lawyer here, but that  
10 lawyer is representing what the Secretary or the Department of  
11 Education says. And you've got to -- I'm going to stick to my  
12 order. Submit something that says that the Secretary of the  
13 Department of Education agrees with the concession you have  
14 made here today, which is that the RSA does not apply. Set it  
15 out -- I'll set it out in some detail and I want to know what  
16 the Secretary of the Department of Education says, not what  
17 the Department of Justice says, because the Department of  
18 Justice is not the party. The party is the Secretary of  
19 Education.

20 Now, to be sure, the Department of Justice can  
21 provide representation for the secretary, but the Department  
22 of Justice can't do what it wants to do. Its got a client.

23 MR. LUH: Your Honor, the real party in interest is  
24 the United States and the United States is the client.

25 THE COURT: You can't come in here and tell me what

1 the Department of Education says because in somebody's view, I  
2 don't know whose view, the United States says so and so.

3 Do what I say. I'll take this matter under  
4 advisement, but I don't think a fair-minded person can take  
5 what you've said today in conceding about the RSA to be  
6 consistent with that letter.

7 MR. LUH: Your Honor, I understand the order and  
8 will comply with the order. I would like to, however, make  
9 the point that again this letter is not in a form of a formal  
10 opinion expounding an interpretation of the --

11 THE COURT: So now you're saying the Secretary of  
12 Education didn't mean what she said?

13 MR. LUH: Your Honor, it's not --

14 THE COURT: It doesn't have the authority to what  
15 she said -- to say what she said.

16 MR. LUH: No, Your Honor, what we're saying here is  
17 that the letter was a communication to a member of Congress  
18 following up on a conversation that the Secretary had with a  
19 member of Congress. This is not guidance posted on the agency  
20 website in terms of how the --

21 THE COURT: Well, all right. I think that's a point  
22 well taken, but before you come in here and make a statement  
23 about this is what the Department of Education says and  
24 there's this letter, I'm not moved very much by, well, it's  
25 just a letter to a congressman. I want to get it straight.

1 And I'm not moved by the notion that you've  
2 discussed this with somebody in the Department of Justice.  
3 That's not good enough. As a lawyer, which you-all are, the  
4 Department of Justice is a lawyer for a client. The client is  
5 the secretary of the Department of Education. You have to  
6 consult with the client if you're going to make concessions.

7 MR. LUH: And, Your Honor, we have, again, consulted  
8 with the Department of Education which speaks for the  
9 Secretary. But, Your Honor, again --

10 THE COURT: You want to tell me who --

11 MR. LUH: I think we're getting a bit off track  
12 because --

13 THE COURT: Just a moment. When I start, you stop.

14 MR. LUH: Certainly, Your Honor, I didn't realize  
15 that you started. Sorry.

16 THE COURT: Do you want to tell me what the level is  
17 of the person you consulted with at the Department of  
18 Education?

19 MR. LUH: I'd prefer not to do that, Your Honor.  
20 Again, it's a matter within the government in terms of how we  
21 prepare litigation.

22 THE COURT: Well, obviously, I'm suggesting that you  
23 consulted with somebody who doesn't have the authority to tell  
24 you what they told you given this letter.

25 MR. LUH: Your Honor, I don't -- I would not say

1 that the -- that the persons we spoke with lacked authority to  
2 speak on --

3 THE COURT: Of course you wouldn't. You believe  
4 otherwise. And you want me to believe otherwise, but I'm  
5 faced here with a letter that says something that seems at  
6 odds with the representation that you have made on behalf of  
7 the Department of Education. And you've told me, well, you  
8 shouldn't take the letter as such because it's not formal  
9 rulemaking, et cetera, et cetera. But, it's a letter signed  
10 by the Secretary of the Department of Education and I find  
11 that troubling. And it ought to be resolved in some sensible  
12 way and I'm offering you a way to do that.

13 Now, there are other arguments that you've made  
14 about the letter. About it really doesn't say exactly that  
15 and so forth and so on. And, yes, those are all points that I  
16 understand you can make, but it doesn't erase the fact that I  
17 have this letter and it is contrary, reasonably contrary, to  
18 the representation you've made.

19 MR. LUH: I understand your concerns, Your Honor,  
20 and I also understand the order. The only additional point I  
21 would make, again, is to reiterate that this is the position  
22 of the Department of Education in litigation which is  
23 determined by the Department of Justice, the Attorney General  
24 under 28 U.S.C. 515. The -- it's the Department of Justice  
25 that represents agencies in litigation and determines the



1 position of the United States.

2 THE COURT: And the Secretary has nothing to say  
3 about it?

4 MR. LUH: Again, Your Honor, the -- the Department  
5 of Justice, in presenting the position of the United States,  
6 works closely with the agencies involved.

7 THE COURT: All right. And if there's a  
8 disagreement between the agency head, the Secretary of the  
9 Department and the Department of Justice, does the Department  
10 of Justice prevails?

11 MR. LUH: I -- Your Honor, I don't know what whether  
12 --

13 THE COURT: I don't think you do either. I've heard  
14 enough today.

15 It's important to know whether you say the United  
16 States agrees that the RSA doesn't apply here and you say the  
17 Department of Education agrees with that and the Department of  
18 Justice rules on this. Perhaps. I frankly have not had that  
19 issue. But to say that the Secretary of Education agrees with  
20 what you've said today when I see this letter, seems to me, to  
21 be ignoring what the letter says.

22 All right. I will issue the order. Yes.

23 MR. NOLAN: Your Honor, can I just finish the  
24 thought I was in the middle of?

25 THE COURT: You've got about a minute.

1 MR. NOLAN: A minute will be fine.

2 THE COURT: All right, do so.

3 MR. NOLAN: I simply wanted to point out what the  
4 Fourth Circuit said about the very point you're talking about.  
5 And the Fourth Circuit said in the *NISH v. Cohen* case, when as  
6 here, an agency such as the Department of Education is charged  
7 with implementation of a statute, its policy's decisions are  
8 decided are entitled to deference.

9 And they follow it up by saying, "This fact is  
10 significant underscoring the point that the Department of  
11 Defenses role in implementing the Randolph-Sheppard Act is  
12 primarily to follow the decisions of the Department of  
13 Education. It is the Department of Education's administration  
14 of the Randolph-Sheppard Act that is authorized by statute and  
15 thus entitled to deference."

16 THE COURT: All right. Yes.

17 MR. HOLMAN: Your Honor, I apologize, but having not  
18 had an opportunity to respond to that, I just want to take up  
19 -- I'll be very brief. I do want to touch on a few points.

20 THE COURT: No, it's way past the time.

21 MR. HOLMAN: I understand, Your Honor.

22 THE COURT: Two minutes.

23 MR. HOLMAN: Yes, thank you.

24 First of all, Mr. Nolan hasn't talked about the  
25 source of this letter. I think it's important, Your Honor, to

1 understand that this is a letter that was obtained -- it's not  
2 a public letter -- this is no doubt Mr. Nolan went through his  
3 congressional representative and had a --

4 THE COURT: It doesn't matter. Did she say it or  
5 did she not? She --

6 MR. HOLMAN: Exactly, Your Honor. If she did say  
7 it, was she intending to do it in a regulatory capacity.

8 THE COURT: All right. He's going to be able to  
9 tell me next week in some form that's reliable, did you mean  
10 it when you said it.

11 MR. HOLMAN: I have no objection to that, Your  
12 Honor. I just wanted to point out that this is a letter that  
13 was obtained through a congressional office and a constituent  
14 no doubt. There was no public process in this. Nobody had --

15 THE COURT: He's already said that.

16 MR. HOLMAN: Okay. Your Honor, the other point --  
17 the other point I want to make clear about *NISH* that was just  
18 brought up --

19 THE COURT: None of that changes that she said what  
20 she said in the letter.

21 MR. HOLMAN: I understand, Your Honor. What we came  
22 -- to be clear, we came into this case, I didn't know what the  
23 Department of Education point of view is. I knew what the  
24 U.S. AbilityOne Commission position was, I knew what the  
25 army's was.

1 THE COURT: I don't care what you knew when you came  
2 into the case.

3 MR. HOLMAN: Well, I understand that. Your Honor,  
4 what I'm trying to say is that there are numerous agencies  
5 involved here, which the Department of Education is one and I  
6 hope the Court does not lose the thread.

7 I don't care whether the Department of Education  
8 comes out that time next week because we're right. The U.S.  
9 AbilityOne Commission has also looked at this.

10 THE COURT: What about Fourth Circuit's statement  
11 that they are -- their policy is primary?

12 MR. HOLMAN: I think that -- I think Mr. Nolan  
13 misinterprets that. Indeed, Your Honor, the Fourth Circuit  
14 defers to the United States Army's determination in *NISH*. And  
15 if you wanted to see what the --

16 THE COURT: All right. Look, enough.

17 MR. HOLMAN: Yes, Your Honor.

18 THE COURT: By Thursday of next week, you may each  
19 file further briefs not to exceed ten pages addressing this  
20 letter and I'll not enter an order, but I'll require -- I'll  
21 simply state that and the government will have to include in  
22 theirs something that tells me that that is the Secretary of  
23 Education's view. That is the decision that the RSA applies  
24 or the RSA doesn't apply.

25 All right. Anything else?

1 MR. HOLMAN: Nothing, Your Honor.

2 THE COURT: And you can say simply that the -- the  
3 Secretary of Education has been consulted specifically about  
4 this and takes a specific view. Anything else?

5 MR. HOLMAN: Nothing, Your Honor. Thank you.

6 THE COURT: Court stands in recess.

7

8 **(Proceedings adjourned at 1:44 p.m.)**

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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motions hearing in the case of the **SOURCEAMERICA, et al., versus UNITED STATES DEPARTMENT OF EDUCATION**, Civil Action No. 1:17-CV-893, in said court on the 12th day of October, 2018.

I further certify that the foregoing 38 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this October 16, 2018.



Tonia M. Harris, RPR  
Official Court Reporter